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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON BRADWELL LEWIS,

Defendant and Appellant.

D071498

(Super. Ct. No. SCD264871)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia Meza, Judge. Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Arlene A. Sevidal, Collette C. Cavalier and Alan L. Amann, Deputy Attorneys General, for the Plaintiff and Respondent.

A jury convicted Jason Bradwell Lewis of first degree murder of J.R. (Pen. Code,¹ §187, subd. (a).) He admitted he had two prison priors (§§ 667.5, subd. (b), 668, 667, subd. (a)(1), 1192.7, subd. (c), 667, subds. (b)-(i), 1170.12). The court sentenced him to 56 years in prison.

Lewis contends: (1) the trial court erroneously denied his motion for judgment of acquittal under section 1118.1 because there was insufficient evidence that he deliberated and premeditated the murder to support a first degree murder conviction; (2) the court abused its discretion in admitting into evidence recordings of 911 telephone calls that the victim's mother made, and (3) his trial counsel provided ineffective assistance of counsel by failing to object to the admission of certain statements in the 911 recordings, which were prior consistent statements under Evidence Code section 791, and also by failing to object to the prosecutor's alleged misconduct in playing the 911 recordings more than once during trial. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2015, J.R. and her boyfriend arrived in San Diego from Colorado. They booked a third-floor room at a downtown motel. That afternoon, the boyfriend and J.R. got into an altercation, and police arrested him and booked him into jail. He never had contact with J.R. again.

¹ Undesignated statutory references are to the Penal Code.

Lewis was staying on the fifth floor of the same motel. That night, motel employees saw Lewis and J.R. in a store and, shortly afterwards, at around 9:30 or 10:00 p.m., at the motel. Video surveillance cameras at the store and the motel also captured Lewis and J.R. together. J.R. telephoned her mother in Wisconsin several times that day. During a late-night conversation, her mother heard a male in the background call J.R. a "bitch" and say that "[he] didn't want to hear about how her boyfriend was in jail." This phone conversation lasted approximately two hours. Her mother regarded that as unusually long, and believed J.R. was deliberately keeping her on the phone, even as J.R. was conversing with somebody else at the same time. Her mother did not hang up because she thought she could at least monitor events on J.R.'s end.

In the last phone conversation, around midnight in San Diego, J.R. sounded upset. J.R. asked if her mother ever had a nightmare from which she could not wake up, because J.R. felt her life was a nightmare. Afterwards, her mother overheard J.R. twice telling somebody in an irritated tone of voice, "Turn the fucking light on." J.R. also said, "I have elbows," an expression that J.R. used when she felt threatened. Shortly afterwards, J.R.'s mother heard J.R. moan and say something like, "Uh." Afterwards, her mother heard a thud and "just a lot of moving." J.R. said, "It hurts," as if she was in pain, and in a tone of voice that seemed "very passive, submissive almost." Her mother heard a commotion that "just kept going and going and going and then it didn't stop" until the telephone call was disconnected.

J.R.'s mother immediately called 911 in Wisconsin. Afterwards, she called 911 in San Diego several times. The recordings of her calls were played for the jury. In

describing what she had heard on the phone, J.R.'s mother told a 911 operator in one call, "[L]iterally, someone is beating the hell out of [J.R.] and they hung up the phone."

In one 911 call, J.R.'s mother told the operator she could hear things being thrown around and that she did not believe the call ended because her daughter's phone battery had died or her daughter had hung up the phone.

On December 13, 2015, police went to check J.R.'s motel room, but she was not there.

The next day, Lewis was captured by surveillance video buying a suitcase at a store.

That same day, J.R.'s boyfriend was released from jail. He discovered that J.R. was missing from the motel. He called 911, and a recording of his call was played for the jury.

Just before midnight on December 14, 2015, the motel's housecleaning staff found J.R.'s body in a second-floor bathroom. The staff member called 911, and a recording of this call was played for the jury.

On December 15, 2015, the motel's housecleaning staff asked if Lewis wanted his bedroom cleaned, but he declined. Before that day, the motel's house cleaning staff had not cleaned Lewis's room because a "Do Not Disturb" sign was posted on his door.

A San Diego Police Department criminalist who did a crime scene reconstruction and bloodstain pattern analysis in this case testified that given J.R.'s extensive injuries, the absence of spatter stains in the bathroom indicated that J.R. was not killed there; rather, she was beaten in Lewis's room and afterwards her body was deposited in the

second-floor bathroom. Lewis's fingerprint was found on the bathroom wall. The criminalist testified that in Lewis's room, "all of the legs on that bed frame were bent as though a struggle may have occurred." The criminalist observed approximately 30 stains on one wall of Lewis's room and approximately ten on its other wall. There was also blood on a bed leg. Some of the blood in Lewis's room was tested and identified as J.R.'s. Police found a bloodstained sheet, a mattress pad, a towel, and J.R.'s cell phone in a second-floor garbage bin. J.R.'s DNA was found on the sheet.

A medical examiner performed an autopsy on J.R., who weighed approximately 104 pounds, and concluded she had received at least 16 blunt force injuries to her head and neck: "I didn't count her arms or legs. . . . Her right ear was all, essentially bruised and had scrapes and tear[s]. I counted that conservatively as just one impact. It could represent more. And same thing with the left ear, one impact. The broken nose, one impact. Each could be more. The blood under the right side of the scalp again, it could represent multiple injuries, but I counted it as one. And each of the separate bruises and scrapes along the left side of her jaw and neck, just the three big ones, I counted as just one. So I made a conservative count like that." J.R. received the following blunt force injuries while she was still alive: fractured left and right jaw, torn left and right ears, a bruised right eye and hemorrhage to her left and right eyes, a broken nose, hemorrhage under the right and the left sides of her scalp, hemorrhage to her brain, hemorrhage to the neck and epiglottis or voice box, and a fractured hyoid bone like those sometimes seen in strangulation cases. In discussing the difficulty of breaking the hyoid bone, the medical examiner stated: "As far as how easy it is to get [a fractured hyoid bone], I can only

compare to people that kill themselves by hanging. They have a sustained pressure to their neck in that area, and they usually don't have fracture of their hyoid bone. That's just a way to compare force." Lewis's DNA was found under J.R.'s left and right-hand fingernails and on her labia and her right breast.

The medical examiner testified that based on the autopsy, J.R.'s time of death was probably around midnight on December 12, 2015. He testified her death would not have been immediate; rather, any strangulation could have taken between four to six minutes. He also testified J.R.'s body was moved after it had been in one position for more than eight hours. He testified that J.R.'s blood alcohol content was .31 milligrams per liter, and her methamphetamine concentration was .42 milligrams per liter. The medical examiner concluded J.R.'s cause of death was blunt force trauma of the head and neck, including neck compression, with alcohol and methamphetamine as contributing factors. The manner of death was homicide.

On December 17, 2015, police arrested Lewis at the motel. He had 0.12 grams of methamphetamine on his person. Lewis had a bruise on one arm and discolored knuckles on both hands. The suitcase Lewis had bought was in his bedroom. It had transfer blood stains matching J.R.'s, and contained J.R.'s bloodstained clothing, on which Lewis's DNA was found.

DISCUSSION

I.

Lewis contends the trial court erroneously denied his motion for judgment of acquittal under section 1118.1, as the prosecution did not present sufficient evidence to

support a first degree murder conviction. He concedes the trial evidence sufficed "to establish intent to kill or implied malice and, therefore, a second degree murder conviction."

A. Background

At the end of the People's case-in-chief, Lewis moved for a judgment of acquittal on grounds the People had not presented sufficient evidence of motive, premeditation or deliberation to sustain a first degree murder charge. The prosecutor responded: "Motive is not required. But beyond that, what we have here in the court heard testimony of, a significant brutal beating, at least 16 strikes to the upper body—that would have been to her head and neck area—which would have been committed while she was alive—that coupled with the other evidence of not only just the manner of her death or how her death—but even his actions afterward I think support a finding of first degree murder." The court summarily denied the motion.

B. Applicable Law

In reviewing a challenge to a court's denial of a section 1118.1 motion, "we ask whether 'there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged.' " (*People v. Watkins* (2012) 55 Cal.4th 999, 1019 (*Watkins*).)

"In assessing such a claim, we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] 'The federal

standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*Watkins, supra*, 55 Cal.4th at pp. 1019-1020.)

" 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,], which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " ' " (*Watkins, supra*, 55 Cal.4th at p. 1020, italics omitted.)

"Murder is the unlawful killing of a human being with malice aforethought. [Citation.] Malice may be either express or implied. Express malice exists when there is a deliberate intention unlawfully to take away the life of a fellow creature. [Citation.] It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart." (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1263.)

In order for a killing with malice aforethought to be first rather than second degree murder, the intent to kill must be formed on a preexisting reflection and must have been the subject of actual deliberation or forethought. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) A verdict of first degree murder on a theory of willful, deliberate and premeditated killing is proper only if the defendant killed as a result of careful thought and weighing of considerations; as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. (*Ibid.*)

" 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

"Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

" ' "Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or

a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from [*Anderson, supra*,] 70 Cal.2d [at pp.] 26-27, 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' " " " (*People v. Prince* (2007) 40 Cal.4th 1179, 1253.) If the *Anderson* factors are not present, a finding of premeditation and deliberation can still be upheld based on substantial evidence from which rational jurors could have found that the killing was the result of preexisting thought and the careful weighing of considerations. (*People v. Boatman, supra*, 221 Cal.App.4th at p. 1270.)

Even if the evidence regarding some of the *Anderson* factors is weak, we note that "[i]n reviewing sufficiency of evidence claims, each case of necessity must turn on its own particular facts." (*People v. Smith* (2005) 37 Cal.4th 733, 745.) Further, "[e]vidence of all three elements is not essential . . . to sustain a conviction." (*People v. Edwards* (1991) 54 Cal.3d 787, 813.) Rather, "[t]hese three categories are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive." (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

C. *Analysis*

We conclude the prosecution presented sufficient evidence that Lewis acted with the intent necessary to sustain a first degree murder charge. Based on J.R.'s mother's account of the start of Lewis's fatal attack, J.R. did not provoke the attack. Rather, the jury could reasonably infer Lewis used the element of surprise and turned off the light in

the room. J.R. told him to turn the light on and made a remark, "I have elbows," indicating she felt threatened. But Lewis proceeded, and J.R.'s mother heard a thud as well as J.R.'s moan and protest that "it hurts." Undeterred, Lewis continued attacking J.R. for some time longer, prompting J.R.'s mother to tell a 911 operator that someone was "[l]iterally beating the life out of [J.R.]" A jury also may infer that Lewis disconnected J.R.'s last phone call with her mother in order for him to proceed with his attack without being interrupted, thus evincing that he premeditated her murder.

The approximately 16 blunt force injuries that Lewis inflicted to the vulnerable parts of J.R.'s body, her face and neck, show that he had a premeditated intention to kill her, as he did not stop until he had accomplished that goal. He broke her hyoid bone, which the medical examiner testified was not easy to accomplish. The jury could infer based on the autopsy that Lewis strangled her, and that he would have spent at least four to six minutes choking her before she died. Lewis had ample time and opportunity to stop the planned murder and change course but instead, according to the forensic evidence, a struggle ensued. Lewis proceeded to break J.R.'s jaw in two places, and her nose, tear both ears, and cause hemorrhages to her scalp and brain.

Considering the amount of time Lewis had spent with J.R. before the murder and the fact that he had methamphetamine on his person when arrested, it is reasonable to infer he knew J.R. was intoxicated and under the influence of drugs. The jury could reasonably infer he took advantage of that, and her small size, when considering killing her. At no point did Lewis seek medical attention for her or inform the police of her injuries. Instead, Lewis evinced a consciousness of guilt by concealing evidence of his

attack. Specifically, he selected a sufficiently large suitcase to accommodate J.R.'s body, which he took to a bathroom on a different floor. He also disposed of sheets and clothes in the garbage bin on that floor. We conclude the above evidence sufficed to show that Lewis acted with the intent necessary to commit first degree murder.

The California Supreme Court reached a similar conclusion in *People v. Raley* (1992) 2 Cal.4th 870, where the defendant stabbed the victims numerous times, then drove them around, beat them, and dumped their bodies in a ravine, after which one victim died. The court found sufficient evidence to support the jury's finding of premeditation and deliberation, explaining, "Even if we were to agree that it could only be concluded that the many stab wounds defendant inflicted on each woman were part of an unreflective explosion of violence, his calculated decision to let them bleed for the next 18 hours, to refuse medical attention, to beat them about the head and to dump them on a winter night into an isolated ravine supports the conclusion that he premeditated the death of [the murder victim]." (*Id.* at p. 888.) Here, a jury could reasonably conclude that after Lewis inflicted at least 16 major impact blows on J.R, he left her to bleed and die. That calculated decision supports a finding of premeditation.

In *People v. Daya* (1994) 29 Cal.App.4th 697, the court stated: "[I]n this case the deficiency is not in the evidence of culpability but rather the deficiency of any plausible explanation for the abundance of evidence pointing to the defendant's postmurder consciousness of guilt." Likewise, here, as noted, there was overwhelming evidence of Lewis's consciousness of guilt.

II.

No Prejudicial Error in Admitting into Evidence Recordings of J.R.'s Mother's 911 Calls

Lewis contends the court prejudicially erred by admitting into evidence recordings of J.R.'s mother's 911 calls. He concedes the statements in the 911 calls were nonhearsay and spontaneous; however, he argues they were prejudicial under Evidence Code section 352, as he "did not deny being the perpetrator or deny liability for second degree murder charge; the sole defense was that the prosecutor had failed to prove premeditation or torture." He argues, "There was no evidence of intent to torture [J.R.] The prosecutor's only argument for first degree murder was to convince the jury that the attack was so brutal and so vicious that it equated to torture. Under these circumstances, evidence tending to cause an emotional response of sympathy for the victim and her mother was likely to cause the jury to give too much weight to the violence of the crime and to convict [him] of first degree murder despite the weakness of the prosecutor's case." Pointing out the prosecutor played the recordings during opening and closing arguments and during J.R.'s mother's testimony, he concludes: "The tapes were used to cause a visceral reaction based on the panic [J.R.'s mother] felt the evening of the murder and her frustration at her inability to prevent the crime from occurring. By playing the tapes to the jury specifically to highlight [the mother's] fear for an emotional reaction, the prosecutor sought the undue prejudice defense counsel tried to avoid in moving to exclude the tapes."

A. Background

Before trial, the People moved in limine to admit into evidence four recordings of J.R.'s mother's 911 calls "both for the nonhearsay purpose of circumstantial evidence regarding the timing and circumstances of [J.R.'s] death, including the identity of her killer, but also to show the victim's state of mind."

Lewis objected to J.R.'s mother's first 911 call, the one made to the operator in Wisconsin, on grounds that it lacked probative value and unfairly prejudiced the defense because the operator did not properly assist J.R.'s mother. Lewis did not object to the third 911 call.

The court ruled the recordings were admissible: "So I think that would come in because that qualifies as something that the declarant is hearing, right? It's action that's happening, so she's hearing it. Her daughter's statement, it comes in as an exception to the hearsay rule and that it is a contemporaneous statement. So I think both the victim's statement and mom's statement comes in[.]" But the court agreed to redact some of the 911 calls.

B. Applicable Law

As Lewis concedes that J.R.'s mother's statements in the 911 calls qualified as nonhearsay and spontaneous, the criteria for their admission under Evidence Code section

1240 are met.² Lewis argues that under Evidence Code section 352, he was prejudiced by the admission of the 911 recordings. He specifically argues the calls conveyed the mother's panic as she tried to obtain help for her daughter, and "[t]his panic was not relevant to a determination of guilt or to a determination of the degree of the crime; but it was likely to emotionally, and improperly, impact the jury's deliberations."

We reiterate what the concept of "undue prejudice" means in the context of Evidence Code section 352. " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in [an Evidence Code] section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . ' "The 'prejudice' referred to in Evidence Code section 352

² Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The admission of evidence under Evidence Code section 1240 does not implicate an accused's federal constitutional rights to due process and confrontation of witnesses. (*People v. Merriman* (2014) 60 Cal.4th 1, 67.) Thus, ordinarily the admission of evidence not authorized by Evidence Code section 1240 is subject to review only for state law error. (*Id.* at p. 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) "Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*People v. Merriman, supra*, at p. 65.)

applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.' "[Citation.]' ¶ The prejudice that [Evidence Code] section 352 "is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information[] not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.) We review the admissibility of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

We conclude that under Evidence Code section 352, the probative value of J.R.'s mother's 911 recordings outweighed any prejudice. The recordings allowed the jury to understand the circumstances surrounding the start of the fatal attack based on what the mother heard over the phone while speaking with J.R. (Accord, *People v. Boyce* (2014) 59 Cal.4th 672, 687-688 ["'As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim' [citation], and even if it 'duplicate[s]

testimony, depict[s] uncontested facts, or trigger[s] an offer to stipulate' "].) In *People v. Roybal* (1998) 19 Cal.4th 481, the California Supreme Court upheld admission of spontaneous statements of the victim's husband to a 911 dispatcher and to an officer describing the crime scene and his wife's body. In the 911 call he reported that his wife was covered in blood and not breathing, and that it looked as if she had been murdered. During an interview, he described finding his dead wife lying in the hallway, and explained how he entered the house. (*Id.* at p. 515.) The court observed that the tapes were "relevant to show [the husband's] initial reaction to the discovery of his wife's body and dispel any suggestion that he was involved in the murder; they also described the scene of the crime." (*Id.* at p. 519.)

Even if we agreed with Lewis that some portions of the first 911 recording should have been redacted to avoid distracting the jury regarding the Wisconsin dispatcher's inability to help the mother, any error was harmless in light of the evidence of premeditation. Specifically, the nature and length of Lewis's attack on J.R. as set forth above, the fact Lewis turned off the lights, and the likelihood that he disconnected the phone call all point overwhelmingly to the inference Lewis deliberated before murdering J.R.

As for whether the prosecutor's playing of J.R.'s mother's 911 call three times became cumulative and prejudicial, as Lewis concedes, trial counsel did not object to the prosecutor playing the recordings during closing arguments. We therefore deem the claim forfeited. In any event, as the evidence was properly admitted, the prosecutor did not err by emphasizing certain parts of it for the jury. Further, the jury was instructed

with CALCRIM No. 200: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision." We presume the jury followed this instruction. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [jurors are presumed to be able to understand and correlate instructions and are presumed to follow the court's instructions].)

III.

No Ineffective Assistance of Counsel

Lewis contends he received ineffective assistance of counsel, who failed to object to the admission of 911 recordings of J.R.'s mother, her boyfriend and the motel housecleaner who found J.R.'s body on grounds they were irrelevant and inadmissible as prior consistent statements under Evidence Code section 791.

Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

All defendants in criminal proceedings have a constitutional right to effective assistance of counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient such that it "fell below an objective standard of reasonableness" and that the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) To show prejudice, a defendant must establish by a reasonable probability that if counsel's performance was not deficient, he would have received a more favorable result. (*Id.* at p. 694.) In considering a claim of ineffective assistance of counsel, it is not necessary to determine " 'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, at p. 697.)

Assuming without deciding that Lewis's trial counsel erred by failing to object under Evidence Code section 791, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Lewis could not show prejudice because the witnesses' calls were merely cumulative. (See *People v. Arias* (1996) 13 Cal.4th 92, 153 ["it is not reasonably probable that such erroneous admission affected the verdict"].) It is not reasonably probable the jury would have reached a result more favorable to Lewis if the 911 recordings had not been admitted. This case did not turn on the 911 calls or the recordings of them. Rather, it turned on the extensive blunt trauma Lewis inflicted on

J.R., and Lewis's postmurder conduct of concealing the evidence of his attacks on J.R., thus evincing consciousness of guilt. (Accord, *People v. Kopatz* (2015) 61 Cal.4th 62, 87.)

IV.

No Prosecutorial Misconduct

Lewis contends his trial counsel improperly failed to object to what amounted to prosecutorial misconduct when the prosecutor "used the [911] calls to improperly inflame the emotions of the jury to increase the likelihood of a first degree murder conviction" by playing the recordings during the People's opening and closing arguments, in addition to during the witnesses' testimony.

A prosecutor's misconduct violates the federal Constitution and requires reversal when it infects the trial with such unfairness as to deny due process. (*People v. Tully* (2012) 54 Cal.4th 952, 1009.) Under state law, a prosecutor's conduct that does not render a criminal trial fundamentally unfair is still error if it involves the use of deceptive or reprehensible methods in attempting to persuade the trier of fact. (*Id.* at pp. 1009-1010.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations.] A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' " (*People v. Hill* (1998) 17 Cal.4th 800, 823.) Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defense makes a timely objection and requests an admonition to cure any harm.

(*People v. Centeno* (2014) 60 Cal.4th 659, 674 [claim is not misconduct, it is failure to object to 911 calls].)

Lewis's focus on the prosecutor's closing arguments is premised on his assertion that the 911 recordings were erroneously admitted into evidence. We have already rejected his challenges to the admission of the 911 recordings. Because Lewis has not established any error in the admission of the 911 recordings, we conclude the prosecutor did not engage in prejudicial misconduct by referring to them during closing arguments. The prosecutor's argument referred the jury to the recordings in evidence along with J.R.'s mother's testimony. This was not misconduct.

Moreover, a prosecutor may comment on the evidence admitted during trial and suggest inferences that may be drawn from the evidence. (*People v. Medina* (1995) 11 Cal.4th 694, 757.) In response to defense counsel's argument that the evidence was insufficient, the prosecutor is entitled to emphasize admitted evidence and testimony that tended to show Lewis's guilt. Consequently, Lewis did not receive ineffective assistance of counsel when his trial attorney did not object to the prosecutor's use of the recordings during closing arguments.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.